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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

GOVERNMENT EMPLOYEES
INSURANCE COMPANY,

Plaintiff,

v.

ANSHUMAN S. NADKARNI, an individual;
RENUKA NADKARNI, an individual,

Defendants.

Case No. 3:19-cv-01302

**GOVERNMENT EMPLOYEES
INSURANCE COMPANY'S NOTICE OF
MOTION AND MOTION FOR
SUMMARY JUDGMENT**

Date: April 23, 2020
Time: 9:30 a.m.
Judge: Hon. Laurel Beeler
Courtroom: B (15th Floor)

NOTICE OF MOTION FOR SUMMARY JUDGMENT & RELIEF SOUGHT

PLEASE TAKE NOTICE THAT on April 23, 2020, at 9:30 A.M. or as soon thereafter as the matter may be heard, in Department B (15th Floor) of the above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, CA 94102, Plaintiff Government Employees Insurance Company ("GEICO") will and hereby does move the Court for summary judgment pursuant to Federal Rules of Civil Procedure, Rule 56, and Civil Local Rules, Rule 56.1.

This Motion seeks an order granting summary judgment in favor of GEICO on the First Amended Complaint's Second Cause of Action (Duty to Indemnify) and Third Cause of Action (Right to Reimbursement). GEICO brings this Motion on the ground that no genuine dispute as to any material fact exists concerning (1) whether GEICO has a Duty to Indemnify Defendants Anshuman S.

1 Nadkarni and Renuka Nadkarni under the GEICO Personal Umbrella Policy for their liability in the
 2 underlying action for wrongful eviction filed against them entitled *Venegas, et al. v. Nadkarni, et al.*,
 3 S.F. Sup., No. CGC-18-571212 (the “*Venegas* Action”), and (2) whether GEICO is entitled to
 4 reimbursement from said Defendants of all defense fees and costs incurred in the *Venegas* Action.
 5 This Motion follows the Court’s July 11, 2019 Order denying Defendants’ Motion for Judgment on
 6 the pleadings in which the Court concluded that all of the relevant events alleged in the *Venegas*
 7 Action occurred before the policy’s May 2019 effective date and the Court’s November 22, 2019
 8 grant of GEICO’s Motion for Partial Summary Judgment on the First Cause of Action (Duty to
 9 Defend), in which the Court held “the ‘occurrence’ of the eviction was demonstrably before” the
 10 policy’s May 8, 2019 effective date. July 11, 2019 Order at 11:10-14 (Doc. No. 26); November 22,
 11 2019 Order at 14: 17; 12: 21 (Doc. No. 50).

12 GEICO is entitled to summary judgment on the Second Cause of Action for Indemnity because
 13 the *Venegas* Action does not fall within the GEICO’s policy’s coverage, and under California Law,
 14 “where there is no duty to defend there *cannot* be a duty to indemnify.” Certain Underwriters at
 15 Lloyd's of London v. Superior Ct., 24 Cal.4th 945, 958, 03 (2001).

16 With respect to the Third Cause of Action for Reimbursement of Defense Costs, GEICO,
 17 having agreed to fund the defense of the *Venegas* Action on behalf of its insured under a full and
 18 complete reservation of rights, is now entitled under the California Supreme Court’s holding in
 19 Scottsdale Ins. Co. v. MV Transportation, 36 Cal. 4th 643, 658 (2005) to an order requiring
 20 Defendants to reimburse GEICO for the defense costs it paid on Defendants’ behalf as established in
 21 the Declaration of Christopher Trumpower submitted concurrently herewith.

22 This Motion is based upon this notice, the Court’s July 11, 2019 Order (Doc. No. 26), the
 23 Court’s November 22, 2019 Order on GEICO’s previous Motion for Partial Summary Judgment (Doc.
 24 No. 50), the additional points and authorities discussed herein, the Declaration of Christopher
 25 Trumpower in Support of GEICO’s Motion for Summary Judgment, the Declaration of James
 26 Wagoner in Support of GEICO’s Motion for Summary Judgment, all the papers, pleadings and
 27 records on file herein, and on such other further evidence as the Court may receive in connection with
 28 GEICO’s reply filings and at the hearing of this motion.

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1 **ISSUES PRESENTED**

2 ▪ Taking into consideration the grounds for the Court’s denial of Defendants’ Motion for
3 Judgment on the Pleadings and its grant of GEICO’s Motion for Partial Summary judgment holding,
4 as a matter of law, that GEICO does not have a duty to defend Defendants in Venegas, et al. v.
5 Nadkarni, et al. (S.F. Sup. Ct., No. CGC-18-571212) (“*Venegas* Action”), does GEICO have a duty to
6 indemnify Defendants?

7 ▪ Short Answer: No. GEICO has no duty to indemnify Defendants’ for their liability for
8 evicting the Plaintiffs in the *Venegas* Action prior to the inception of the GEICO policy as the Court
9 has already held that as a matter of law GEICO has no duty to defend.

10 ▪ Since the alleged eviction took place prior to the policy period and is not even
11 potentially covered, does GEICO have a right to reimbursement for its defense costs incurred in
12 defending the Defendants in the underlying *Venegas* Action?

13 ▪ Short Answer: Yes. GEICO agreed to fund the defense of the *Venegas* Action on behalf
14 of its insureds under a full and complete reservation of rights, it was determined by the Court that no
15 potential for coverage exists because the wrongful eviction occurred before the policy period and
16 Defendants would be unjustly enriched by GEICO’s bearing of unbargained-for defense costs.

17 **I. SUMMARY OF ARGUMENT**

18 The central insurance coverage question raised in this case is whether the wrongful eviction
19 alleged against Defendants Anshuman and Renuka Nadkarni in the underlying *Venegas* Action
20 occurred during the GEICO policy period which began on May 8, 2018. In its July 11, 2019 Order
21 Denying Defendants’ Motion for Judgment on the Pleadings and in its November 22, 2019 Order
22 granting GEICO’s Motion for Partial Summary Judgment, this Court has already answered this
23 question in the negative.

24 The Court’s July 11, 2019 Order Denying Defendant’s Motion for Judgment on the Pleadings
25 held that the *Venegas* action did not fall or potentially fall within the GEICO umbrella’s coverage
26 based on two undisputed facts in GEICO’s possession at the time it originally disclaimed coverage:
27 First, both the original Complaint and the First Amended Complaint in the *Venegas* Action alleged
28 that pursuant to a Notice of Termination of Tenancy served by Defendants on March 13, 2018, the

1 Venegas plaintiffs vacated the property on April 21, 2018. See Doc. No. 34-2, Ex C, at ¶ 15. Second,
 2 in “Statements of Occupancy” submitted by Defendants to the San Francisco Rent Stabilization and
 3 Arbitration Board and which were both forwarded to GEICO in connection with the tender and
 4 independently obtained from the Board, Defendants certified, under penalty of perjury, that they
 5 recovered possession of the property on or before May 1, 2018. Doc. No. 34-2, Exs. D-F.
 6 Accordingly, the Court’s July 11, 2019 Order Denying Defendant’s Motion for Judgment on the
 7 Pleadings held “the offense was committed before the policy period, meaning, when the tenants left
 8 and when the defendants regained possession. These events happened before May 8, 2018, the
 9 effective date of the GEICO policy.” Government Employees Insurance Company v. Nadkarni, 391 F.
 10 Supp. 3d 917, 928 (N.D. Cal. 2019).

11 Then again in the Court’s November 22, 2019 Order on GEICO’s Motion for Partial Summary
 12 Judgment, the Court based its decision on the same two undisputed facts mentioned above that were
 13 in GEICO’s possession at the time it originally disclaimed coverage. Consequently, the Court held, as
 14 a matter of law, that the *Venegas* Action did not fall or potentially fall within the GEICO umbrella’s
 15 coverage and therefore that GEICO has no duty to defend the *Venegas* Action. First, both the original
 16 Complaint and the First Amended Complaint in the *Venegas* Action alleged that pursuant to a Notice
 17 of Termination of Tenancy served by Defendants on March 13, 2018, the *Venegas* plaintiffs vacated
 18 the property on April 21, 2018. See Doc. No. 34-2, Ex C, at ¶ 15. Second, in “Statements of
 19 Occupancy” submitted by Defendants to the San Francisco Rent Stabilization and Arbitration Board
 20 forwarded to GEICO in connection with the tender and which GEICO also independently obtained
 21 from the Board, Defendants certified, under penalty of perjury, that they recovered possession of the
 22 property on or before May 1, 2018. Doc. No. 34-2, Exs. D-F.

23 Accordingly, this Court correctly held that “[t]he ‘occurrence’ of the eviction was
 24 demonstrably before the policy period,” that GEICO had no duty to defend from the inception of the
 25 *Venegas* Action because the action raised no potential for coverage, and that none of the facts
 26 disclosed during discovery raised any possibility that the wrongful eviction extended into the policy
 27 period. Doc. No. 50 at 14: 17.

28 Shortly after the Court’s Summary Judgment order, the parties to the *Venegas* Action entered

1 into a settlement pursuant to which they agreed to pay the total sum of \$550,000. Wagoner Decl., ¶
 2 3.) Defendants made a demand on GEICO to pay part of the settlement, which GEICO declined based
 3 on the Court's November 22, 2019 Order. (Id.) Following the settlement, the Venegas dismissed the
 4 action, and the Nadkarnis' defense counsel, whom GEICO had retained to defend the Nadkarnis under
 5 a reservation of rights, has now closed their file.

6 By this Motion, GEICO requests judgment in its favor including (i) a judicial declaration that
 7 GEICO has no duty to indemnify the Nadkarnis for any part of the *Venegas* settlement, and (ii)
 8 requiring Defendants to reimburse GEICO for the defense costs it paid on their behalves under a
 9 reservation of rights, as set forth and established in the Declaration of Christopher Trumpower
 10 submitted in support of this Motion.

11 The relief sought by this Motion *necessarily* follow from this Court's July 11, 2019 and
 12 November 22, 2019 Orders establishing that the *Venegas* Action's allegation of dispossession on April
 13 21, 2018, together with Defendants' own certifications under penalty of perjury that they recovered
 14 possession on or before May 1, 2020, forecloses any potential for coverage under the policy and
 15 thereby excused GEICO from providing a defense.

16 Specifically, since the duty to defend is broader than the duty to indemnify, where there is no
 17 duty defend, there *can be* no duty to indemnify. Certain Underwriters at Lloyd's of London v.
 18 Superior Ct., supra, 24 Cal. 4th 945, 958, 103; see also, Erickson-Hall Constr. Co. v. Scottsdale Ins.
 19 Co., 369 F. Supp. 3d 1022, 1031 (S.D. Cal. 2019). Accordingly, there is no genuine issue of material
 20 fact as to GEICO's Second Cause of Action (Duty to Indemnify), and GEICO is entitled to summary
 21 judgment.

22 Further, since GEICO had no duty to defend the *Venegas* Action as a matter of law,
 23 Defendants would be unjustly enriched and GEICO damaged if Defendants are permitted to retain the
 24 benefit of the defense costs which GEICO paid on their behalves in the *Venegas* Action. Since
 25 GEICO paid those defense costs under a full and complete reservation of rights, no genuine issue of
 26 material fact exists as to GEICO's right to be reimbursed for the defense costs paid by GEICO
 27 (including prejudgment interest from the time of payment) and GEICO is entitled judgment as a
 28 matter of law on the Third (and final) Cause of Action. Scottsdale v. MB Transportation 36 Cal. 4th

643 (2005); see also Buss v. Superior Court, 16 Cal. 4th 35, 51 (1997) (insurer entitled to reimbursement for payment of “unbargained-for defense costs”); Evanston Ins. Co. v. OEA, Inc., 566 F.3d 915, 922 (9th Cir. 2009) (prejudgment interest awardable “from the time the funds were expended”).

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

A. The Facts Alleged In The Complaint Of The Underlying *Venegas* Action And The Facts Made Available To GEICO In Connection With The Defendants’ Tender Establish The Wrongful Eviction Took Place Prior To The Inception Of The GEICO Policy

Underlying plaintiffs filed the *Venegas* Action November 7, 2018, and the Nadkarnis tendered the Action under the GEICO Policy on or about November 12, 2018. Trumpower Decl., October 17, 2019 Motion (Doc. No. 34-2) Ex. B at 7; Ex. C.

At the time GEICO initially disclaimed coverage on December 14, 2018, only the original Complaint in the *Venegas* Action had been filed alleging that on March 13, 2018, Defendants served the *Venegas* plaintiffs a Notice of Termination of Tenancy. Trumpower Decl., October 17, 2019 Motion (Doc. No. 34-2), Ex. C at ¶ 15.

The Notice of Termination of Tenancy provided that the Defendants and their minor children would be moving into the Subject Unit and that Plaintiffs must vacate. Id. at Ex. C at ¶ 15.

Allegedly, however, Defendants never moved into the unit. The *Venegas* complaint also alleges that Defendants “endeavored to recover possession of the Subject Unit from Plaintiffs and did recover possession from Plaintiffs without following the provisions of the Rent Ordinance.” Id. at Ex. C at ¶ 26.

Pursuant to the Notice of Termination of Tenancy served by Defendants, the *Venegas* plaintiffs allegedly vacated the subject San Francisco property on April 21, 2018. Id. at Ex. C at ¶ 15.

In connection with the tender of their claim, Renuka Nadkarni confirmed to GEICO via email that they had filed a statement of occupancy with the San Francisco Rent Control Board. Id. at ¶ 5; Ex. D.

Consistent with these representations, GEICO obtained copies of the multiple “Statements of Occupancy” filed on Defendants behalf with the San Francisco Residential Rent

1 Stabilization and Arbitration Board. *Id.* at ¶ 5; Ex. E.

2 ▪ The “Statements of Occupancy” filed on June 11, 2018 and November 8, 2018 both
3 indicate that the notice to vacate the subject premises was served on “3/16/18” and that Defendants
4 “recovered possession” of the premises on “5/1/2018.” *Id.* at Ex. E at 2; at Ex. F at 2.

5 ▪ The “Statement of Occupancy” filed on June 11, 2018 provides that the “notice to
6 vacate was served on 13th March 2018” and that Defendants “recovered possession on 30th April
7 2018.” *Id.* at Ex. G at 2.

8 ▪ Based only on the allegations of original Complaint in the *Venegas* Action and the facts
9 provided in connection with the tender of Defendants’ claim, GEICO denied coverage on December 4,
10 2018. *Id.* at Ex. H.

11 **B. The Facts Uncovered After GEICO’s Denial Letter Corroborate The Allegations**
12 **In The Underlying *Venegas* Action And Show That The Wrongful-Eviction**
Occurred Prior To The GEICO Policy Period

13 After receipt of GEICO’s disclaimer letter, Defendants’ counsel sent correspondence
14 requesting that GEICO reconsider its coverage determination, which in turn led to further
15 investigation and the acquisition of information by GEICO which confirmed the allegations of the
16 original Complaint and further justified GEICO’s declination of coverage. *Id.* at Ex. I.

17 ▪ Defendants owned the property at 2039 Judah Street, San Francisco (“the Property”) at
18 all relevant times. *Wagoner Decl.*, October 17, 2019 Motion (Doc. No. 34-1) Ex. I at 8:23; 10:11;
19 *Trumpower Decl.*, October 17, 2019 Motion (Doc. No. 34-2) Ex. D at 1.

20 ▪ The *Venegas* plaintiffs rented the Property in 2008 and Defendants inherited the
21 tenancy at the time they purchased the property in 2016. *Wagoner Decl.*, October 17, 2019 Motion
22 (Doc. No. 34-1) Ex. J; Ex. I at 8:23; 14-15.

23 ▪ Defendants inquired with the *Venegas* plaintiffs via email in January of 2018 about
24 terminating their tenancy pursuant to a “buy out.” *Id.* at Ex. I at 28; Ex. K; *Trumpower Decl.*, October
25 17, 2019 Motion (Doc. No. 34-2) Ex. B at 5-6.

26 ▪ On or about March 13, 2018, Defendants, having retained counsel to represent their
27 interests in the transaction, served a 60-day Notice of Termination of Tenancy on the *Venegas*
28 plaintiffs signed by Defendants’ counsel. *Wagoner Decl.*, October 17, 2019 Motion (Doc. No. 34-1)

1 Ex. L.

2 ▪ By check dated March 30, 2018, the *Venegas* plaintiffs paid rent for April 2018, but did
3 not pay rent for any portion of May 2018, nor did they otherwise pay rent for any time period within
4 the GEICO policy's effective period. *Id.* at Ex. N; Ex. I at 36:4-5; Ex. D at 3:9-14; Ex. E at 3:9-14.

5 ▪ On April 2, 2018, Rosa Venegas sent counsel for Defendants a letter dated March 31,
6 2018, requesting further relocation expenses due to the elderly status of co-tenant Epifanio Venegas
7 and stating, "I would appreciate if you send the correct amount as soon as possible [*sic*] so we can
8 relocate" and inquiring "Who do we contact if We [*sic*] relocate this month and to who we give the
9 keys?" *Id.* at Ex. O.

10 ▪ On April 21, 2018, Defendant Anshuman Nadkarni sent an email to Rosa Venegas,
11 seeking to schedule a "walk through" *Id.*

12 ▪ On April 29, 2018, Defendants met with the *Venegas* plaintiffs at the Property during
13 which meeting the *Venegas* plaintiffs surrendered their keys to Defendants and Defendants returned to
14 the *Venegas* plaintiffs their entire security deposit and the balance of their required relocation
15 expenses. *Id.* at Ex. D at 4:14-23; Ex. E at 4:14-23; Ex. I at 26:20-25; 27:11-12; 53:12-13.

16 ▪ Defendants recovered possession of the Property on or before May 1, 2018.
17 Trumpower Decl., October 17, 2019 Motion (Doc. No. 34-2) Ex. E at 2; Ex. F. at 2; Ex. G at 2; Ex. B
18 at 6; Wagoner Decl., October 17, 2019 Motion (Doc. No. 34-1) Ex. I, at 37:5-6; 32:15-16, 36:9-10,
19 43:7-8.

20 ▪ On December 7, 2018, Defendants' counsel sent a letter requesting GEICO's
21 reconsideration of its coverage determination. *Id.* at Ex. I.

22 ▪ On January 15, 2019 GEICO acceded to the Defendants' request and provided them
23 with a defense in the *Venegas* Action by way of an offer of independent defense counsel pursuant to
24 Civil Code § 2860, subject to a full reservation of rights under the terms of the GEICO Personal
25 Umbrella Policy ("PUP") and the law, including the right to obtain reimbursement of defense costs
26 incurred. Wagoner Decl., October 17, 2019 Motion (Doc. No. 34-1) Ex. B at 1.

27 **C. The GEICO Action For Declaratory Relief**

28 GEICO filed its Complaint for Declaratory Relief on March 11, 2019 and its Amended

1 Complaint on April 5, 2019. November 22, 2019 Order at 7: 20-21 (Doc. No. 50). Both sought a
 2 determination of whether GEICO's umbrella insurance policy issued to the Nadkarnis required
 3 GEICO to defend or indemnify the defendants in the wrongful-eviction lawsuit brought against them
 4 by their former tenants in the *Venegas* Action. November 22, 2019 Order at 1: 19-23 (Doc. No. 50).
 5 GEICO's complaint has three claims: (1) a claim for declaratory relief regarding GEICO's duty to
 6 defend; (2) a claim for declaratory relief regarding GEICO's duty to indemnify; and (3) a claim for
 7 reimbursement. *Id.*

8 **D. Defendants' Motion For Judgment On The Pleadings And The Court's Order**
 9 **Denying The Same**

10 On May 14, 2019, prior to filing an Answer on May 12, 2019, Defendants filed a Motion for
 11 Judgment on the Pleadings ("MJOP") "on the ground that GEICO has a duty to defend it as a matter
 12 of law." *Government Employees Insurance Company v. Nadkarni*, 391 F. Supp. 3d 917, 920.

13 On July 11, 2019, the Court denied Defendants' MJOP and held that the policy's offense-
 14 based coverage for "wrongful eviction" only applied to occurrences during the policy period
 15 commencing May 8, 2018 and thus no coverage was afforded based on the allegations in the *Venegas*
 16 Complaint and First Amended Complaint. The Court held that there was no duty to defend because
 17 "the offense was committed before the policy period, meaning when the tenants left and when the
 18 defendants regained possession." *Id.* at 928.

19 In an effort to elongate the alleged "wrongful eviction" over time and thereby extend some
 20 portion of it into the policy period of the GEICO policy, Defendants argued that theoretically, the
 21 "eviction" occurred at the expiration of the sixty (60) day eviction notice period. In addition,
 22 Defendants argued that the eviction did not become "wrongful" for coverage purposes until
 23 Defendants failed to move-in to the Property three (3) months after they recovered possession as
 24 required under the San Francisco Rent Ordinance. *Nadkarni, supra*, 391 F.Supp.3d at 926-927.

25 In response, the Court held, based solely on the undisputed facts of the *Venegas* Complaint, the
 26 First Amended Complaint, and the "Statements of Occupancy" filed with the San Francisco Rent
 27 Stabilization and Arbitration Board, that the essential elements of the offense of "wrongful eviction"
 28 took place "prior to the policy's inception." *Nadkarni, supra*, 391 F.Supp.3d at 928. In addition, citing

1 Swain v. California Casualty Ins. Co., 99 Cal.App.4th 1 (2002), the Court held that the 90-day “safe-
 2 harbor” provision upon which Defendants relied “does not render a previous eviction ‘wrongful’ and
 3 instead is evidence about whether the landlord was acting in good faith at the time it served the
 4 eviction notice.” Nadkarni, supra, 391 F.Supp.3d at 927; see also Swain, supra, 99 Cal.App.4th at 9-10
 5 (rejecting policyholder’s argument that the eviction “only became illegal after the fact when the []
 6 [landlord] failed to move into the premises themselves”).

7 Consequently, the Court denied Defendants’ MJOP, stating GEICO has no duty to defend “on
 8 the ground that the facts — as pled — showed that the eviction happened before the policy period.”
 9 November 22, 2019 Order at 18: 2-4 (Doc. No. 50). In its opposition to Defendants’ MJOP, “GEICO
 10 asked for judgment on the ground that the eviction happened before the policy period began.”
 11 Nadkarni, supra, 391 F.Supp.3d at 920. The Court also denied GEICO’s motion for judgment, adding
 12 that “[t]his order is without prejudice to GEICO’s raising the arguments in a motion for summary
 13 judgment.” Id. at 928.

14 **E. GEICO’s Motion For Partial Summary Judgment And The Court’s Order**
 15 **Granting The Same**

16 On October 17, 2019, GEICO moved for partial summary judgment on the First Amended
 17 Complaint’s First Cause of Action (Duty to Defend). GEICO brought the motion on the ground that
 18 no genuine dispute as to any material fact existed concerning whether the GEICO Personal Umbrella
 19 Policy issued to Defendants, the Nadkarnis, covered their potential liability in the underlying *Venegas*
 20 Action for wrongful eviction filed against them because the wrongful eviction took place prior to the
 21 inception of the policy. In opposition, the Defendants contended that GEICO was unable to prove that
 22 the exact date on which the wrongful eviction occurred was prior to the policy period and that “the
 23 provable facts are that the eviction was during a period that overlapped the policy period.” November
 24 22, 2019 Order at 2: 3-5 (Doc. No. 50). Thus, according to Defendants, GEICO “has a duty to defend
 25 under California law (a duty broader than the duty to indemnify) because there is a possibility that the
 26 policy covers a claim.” November 22, 2019 Order at 2: 5-7 (Doc. No. 50).

27 In response, the Court’s order stated that “the policy covers ‘occurrences’ during the policy
 28 period. It is offense-based coverage, and the event ‘triggering coverage’ for covered offenses (here,

1 the wrongful eviction) ‘is the commission of the specified offense during the policy period.’
 2 November 22, 2019 Order at 11: 16-20 (Doc. No. 50) citing Mez Indus., Inc. v. Pac. Nat’l Ins. Co., 76
 3 Cal. App. 4th 856, 865 (1999); also citing Street Surfing, LLC v. Great Am. E & S Ins. Co., 776 F.3d
 4 603, 610 (9th Cir. 2014). The Court further stated that “wrongful eviction is a discrete tort, and the
 5 offense is the injury.” November 22, 2019 Order at 11: 20-22 (Doc. No. 50); see also Swain v.
 6 California Cas. Ins. Co., 99 Cal. App. 4th 1, 10; Menefee v. Ostawari, 228 Cal. App. 3d 239, 246
 7 (1991). In addition, the Court stated that “[t]he events constituting and completing an eviction under
 8 California law are: (i) the owners’ service of an eviction notice; (ii) the tenants’ departure pursuant to
 9 the notice; and (iii) the owners’ repossession of the premises after the tenants’ departure.” November
 10 22, 2019 Order at 11: 22-23; 12: 1-2 (Doc. No. 50). The court found that all relevant dates “...precede
 11 the policy period and have legal significance (meaning, they are dates that define the occurrence).”
 12 November 22, 2019 Order at 12: 8-9 (Doc. No. 50).

13 The Court relied on facts alleged in the *Venegas* Complaint, First Amended Complaint, and the
 14 facts that were provided to GEICO upon Defendants’ tender as the basis for finding that because the
 15 wrongful eviction occurred prior to the policy period, there was no potential for covered liability
 16 alleged. Specifically, the Court found that “[o]n March 13, 2018, [Defendants] served the tenants with
 17 a ‘60 Day Notice of Termination of Tenancy.’” November 22, 2019 Order at 2: 17 (Doc. No. 50). In
 18 addition, the Court found that “[o]n April 21, 2018, the defendants emailed [Rosa Venegas] to
 19 schedule a walk-through of the property the next day. The former tenants apparently vacated the unit
 20 on April 21, 2018.” November 22, 2019 Order at 2: 19, 3: 1-2 (Doc. No. 50). Moreover, the Court
 21 found that “[i]n statements filed under penalty of perjury with the San Francisco Rent Board on June
 22 11, 2018 and November 8, 2018, the defendants said that they obtained possession of the property on
 23 May 1, 2018.” November 22, 2019 Order at 4: 4-6 (Doc. No. 50).

24 Based on the allegations of the *Venegas* Complaint, the First Amended Complaint and the
 25 “Statements of Occupancy” filed with the San Francisco Rent Stabilization and Arbitration Board,
 26 there was never a duty to defend to begin with and the later discovered evidence only confirmed what
 27 was established in the *Venegas* complaints. This later discovered evidence included the corroborating
 28 fact that “the defendants admitted at deposition... that they repossessed the property before they

1 purchased the policy on May 7, 2018.” November 22, 2019 Order at 13: 16-18 (Doc. No. 50). In this
 2 regard, Ms. Nadkarni explained in her deposition that she purchased the GEICO policy which
 3 included wrongful eviction coverage for “any kind of eviction issues,” but that “she did not anticipate
 4 a wrongful eviction lawsuit from the tenants on the purchase date of the policy because the defendants
 5 ‘had successfully completed [their] owner move-in.’” November 22, 2019 Order at 4: 9-11 (Doc. No.
 6 50). In addition, the Court pointed out that Defendants failed to demand any rent for May and that
 7 Defendants took possession on April 29, 2018 when the security deposit and additional relocation
 8 expenses were delivered and the *Venegas* tenants surrendered their keys. November 22, 2019 Order at
 9 3: 2-5 (Doc. No. 50).

10 The Court concluded that, “[t]he ‘occurrence’ of the eviction was demonstrably before the
 11 policy period” starting on May 8, 2018. *Id.* at 14: 17. Thus, the Court “grant[ed] GEICO’s motion for
 12 summary judgment on claim one and [held] that as a matter of law, GEICO had no duty to defend
 13 here.” *Id.* at 16: 2-3.

14 **F. The Underlying *Venegas* Action Has Now Settled And GEICO Has Expended**
 15 **Funds For Defendants’ Counsel**

16 ■ On November 26, 2019, the underlying *Venegas* Claim settled pursuant to an
 17 agreement by which the defendants agreed to pay the Venegases the total sum of \$550,000. Wagoner
 18 Decl., ¶ 3.

19 ■ GEICO declined to contribute any amount towards the settlement based on the Court’s
 20 November 22, 2019 Order. Wagoner Decl., ¶ 3.

21 ■ Defense counsel submitted invoices to GEICO for fees and costs incurred in the
 22 defense of the Nadkarnis in the *Venegas* Action and GEICO paid those invoices. Trumpower Decl.,
 23 October 17, 2019 Motion (Doc. No. 34-2) Ex. D at 1.

24 ■ Total defense fees and costs which GEICO paid in defending the insureds in the
 25 *Venegas* Action are \$43,783.07. Trumpower Decl., October 17, 2019 Motion (Doc. No. 34-2) Ex. D at
 26 1. This total is derived from individual invoices submitted by defense counsel in the underlying
 27 *Venegas* Action to GEICO, all of which are attached to the Declaration of Cristopher Trumpower.
 28 Trumpower Decl., Exs. A-H. GEICO’s proofs of payment for the individual invoices submitted by

1 defense counsel in the underlying *Venegas* Action are also attached to the Declaration of Cristopher
2 Trumpower. *Id.*

3 **III. ARGUMENT**

4 **A. Applicable Legal Standards**

5 **1. Summary Judgment**

6 “A party may move for summary judgment, identifying each claim or defense – or the part of
7 each claim or defense – on which summary judgment is sought.” Fed. R. Civ. P. 56(a). “The court
8 shall grant summary judgment if the movant shows that there is no genuine dispute as to any material
9 fact and the movant is entitled to judgment as a matter of law.” *Id.*

10 The moving party has the initial burden to demonstrate an absence of a genuine issue of
11 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A fact is material only if its
12 resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
13 (1986). Once the moving party has satisfied this initial burden, the non-moving party must then
14 “identify with reasonable particularity the evidence that precludes summary judgment.” *Keenan v.*
15 *Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996). If the non-moving party fails to “make a showing sufficient
16 to establish the existence of an element essential to that party’s case, and on which the party will bear
17 the burden of proof at trial,” judgment against him is appropriate. *Celotex*, *supra*, 477 U.S. at 322.
18 This being a diversity case, California law applies to the substantive issues raised in this motion. *Am.*
19 *Triticale, Inc. v. Ntco Services, Inc.*, 664 F.2d 1136, 1141 (9th Cir. 1981).

20 **B. Since GEICO Has No Duty To Defend Because The Eviction Occurred Prior To** 21 **Its Policy’s Inception, It Follows That It Can Have No Duty To Indemnify**

22 **1. Duty to Indemnify**

23 Under California law, the burden of proof in establishing that coverage exists for a particular
24 loss lies with the insured. *Buss v. Superior Court*, 16 Cal.4th 35, 46; *Armstrong World Industries, Inc.*
25 *v. Aetna Casualty & Surety Co.*, 45 Cal.App.4th 1, 108 (1996). Unlike the duty to defend, the duty to
26 indemnify is triggered by “claims that are actually covered, in light of the facts proved.” *Buss*, *supra*,
27 16 Cal. 4th at 45; *see also Safeco Ins. Co. of Am. v. Superior Court*, 140 Cal. App. 4th 874, 880
28 (2006); *Golden Eagle Ins. Corp. v. Rocky Cola Cafe, Inc.*, 94 Cal. App. 4th 120, 125 (2001). There is

1 “no duty to pay for noncovered claims because the insured did not pay premiums for such coverage.”
 2 Blue Ridge Ins. Co. v. Jacobsen, 25 Cal. 4th 489, 502–03 (2001), opinion after certified question
 3 answered, 10 F. App'x 563 (9th Cir. 2001); quoting Buss, supra, 16 Cal.4th at pp. 50, 51.

4 “The duty to indemnify and the duty to defend are ‘correlative.’” Erickson-Hall, 369 F. Supp.
 5 3d 1022, 1031 (S.D. Cal. 2019); see also Certain Underwriters at Lloyd's of London v. Superior Ct.,
 6 24 Cal. 4th 945, 958, 103. Although correlative, however, “the duty to indemnify and the duty to
 7 defend are not ‘coterminous.’” Certain Underwriters, supra, 24 Cal. 4th App. at 958, 103. “Whereas
 8 the duty to indemnify may indeed be broad, the duty to defend must perforce be broader still, With
 9 this result: where there is a duty to defend, there may be a duty to indemnify; but where there is no
 10 duty to defend, there cannot be a duty to indemnify.” Id; see also J&J Holdings, Inc. v. Great Am.
 11 E&S Ins. Co., 2019 WL 7169789, at *5 (C.D. Cal. 2019) (“In the absence of a duty to defend, no duty
 12 to indemnify exists.”); see also Phase II Transportation, Inc. v. Carolina Casualty Insurance Company,
 13 228 F. Supp. 3d 999, 1008 (C.D. Cal. 2017) (finding that no “duty to indemnify can be triggered
 14 through settlement when there are no covered claims alleged in the pleadings”).

15 **a. GEICO Cannot Have A Duty To Indemnify Where The Court Has**
 16 **Already Held There Is No Duty To Defend As A Matter Of Law**

17 The duty to indemnify “arises after liability is established” and “requires the insurer to
 18 ‘indemnify claims that are covered by the policy.’” Harper Construction Company, Inc. v. National
 19 Union Fire Insurance Company of Pittsburgh, PA, 377 F. Supp. 3d 1134, 1142 (S.D. Cal. 2019); citing
 20 Risely v. Interinsurance Exchange of the Automotive Club, 183 Cal. App. 4th 196, 208 (2010).

21 In opposition to Defendants’ Motion for Judgment on the Pleadings, the Court’s holding was
 22 based on both the allegations in the *Venegas* pleadings and the Statements of Occupancy filed with the
 23 San Francisco Rent Stabilization and Arbitration Board which established that there was never any
 24 potential for coverage and thus, no duty to defend. All of the facts later discovered only confirmed
 25 this. Defendants have been unable to meet their burden of showing that their claim is covered because
 26 from the inception of the *Venegas* Action, the pleadings proved that the wrongful eviction occurred
 27 prior to the inception of the GEICO policy. November 22, 2019 Order at 12: 3-5 (Doc. No. 50). The
 28 Court found that all relevant dates that defined the occurrence were as follows:

(1) March 13, 2018 (when the defendants served the notice of termination of tenancy; (2) April 21, 2018 (when the tenants vacated the property; (3) April 29, 2018 (when the tenants surrendered their keys and the defendants took possession of the property); and (4) May 1, 2018, when the defendants regained possession of the property.

Id.

The Court held that “the ‘occurrence’ of the eviction was demonstrably before” May 8, 2019, the policy’s effective date. Id. at 14: 17; 12: 21). This holding was based solely on the allegations in the pleadings of the *Venegas* complaints and the facts that were provided or obtained by GEICO upon Defendants’ tender. Therefore, the Court granted “GEICO’s motion for partial summary judgment on claim one and [held] that as a matter of law, GEICO had no duty to defend.” Id. at 16: 2-3. From the holding that GEICO does not have a duty to defend, it clearly follows that GEICO cannot owe a duty to indemnify the Defendants in the *Venegas* Action. Erickson-Hall, supra, 369 F. Supp. 3d at 1031.

b. The Court Was Correct In Holding GEICO Has No Duty To Defend

“An insurer ... bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy.” Gray v. Zurich Insurance Co. 65 Cal.2d 263, 276-277 (1966). However, “‘where there is no possibility of coverage, there is no duty to defend . . .’” Fire Insurance Exchange v. Abbott 204 Cal.App.3d 1012, 1029 (1988), quoting State Farm Fire & Cas. Co. v. Superior Court 191 Cal.App.3d 74, 77 (1987). “[T]he insurer need not defend if the third party complaint can by no conceivable theory raise a single issue which could bring it within the policy coverage.” Gray, supra, 65 Cal.2d at p. 276, fn. 15.

According to the complaint in the *Venegas* Action, the *Venegas* plaintiffs vacated the Property pursuant to the Notice of Termination of Tenancy after Defendants asserted that they and their minor children intended to move into the Property. However, Defendants never moved into the unit, yet regained possession of the Property. At the time they recovered possession of the Property on or before May 1, 2018, Defendants did not have offense-based liability insurance coverage for “wrongful

1 eviction.” Rather, Defendants purchased the GEICO policy on May 7, 2018 at approximately 10:05
 2 p.m.

3 The GEICO policy’s coverage for injury arising out of “wrongful eviction,” like its coverage
 4 for malicious prosecution, invasion of privacy, and defamation, is *offense-based coverage*. The event
 5 “triggering coverage” for covered “offenses” “is the commission of the specified offense during the
 6 policy period.” Mez Indus., Inc. v. Pac. Nat. Ins. Co., 76 Cal.App.4th 856, 865, (advertising injury);
 7 Street Surfing, LLC v. Great American E & S Ins. Co., 776 F.3d 603, 610, (same). Here, in order to
 8 trigger coverage, the Defendants would have to prove the completion of the wrongful eviction took
 9 place during the policy period. However, according to the complaint in the *Venegas* Action alone, the
 10 wrongful eviction was clearly complete before the inception of the GEICO policy on May 8, 2018.

11 The policy is triggered by covered *injury* occurring within the policy period. Trumpower
 12 Decl., October 17, 2019 Motion (Doc. No. 34-2) Ex. A at 7 (Pt. IV, § 8). For purposes of insurance
 13 coverage, the courts have held that the essential injury caused by an eviction is the *dispossession* of
 14 the tenant from the property. Cunningham v. Universal Underwriters 98 Cal.App.4th 1141, 1149
 15 (2002) (citing dictionary definitions and holding that “an eviction requires that a person first be in
 16 actual possession of real property, and then be removed from that property”); see also GEICO v.
 17 Nadkarni, 391 F.Supp.3d 917, 927, supra, (citing Cunningham for the proposition that “physical
 18 dispossession is the *sine qua non* of eviction”). According to the *Venegas* Complaint, pursuant to the
 19 Notice of Termination dispossession took place on April 21, 2018. The San Francisco Rent Ordinance
 20 under which the Venegases sued predicates liability on a landlord “*endeavor[ing] to recover*
 21 *possession* of a rental unit” for unauthorized purposes. S.F. Admin. Code § 37.9(a)(8) (emphasis
 22 added). This occurred when the Nadkarnis served the Notice of Termination of March 13, 2018.
 23 Menefee, supra, 228 Cal.App.3d at p. 246 (tenant suing under S.F. Rent Ordinance “was damaged at
 24 the time of service of the 30-day notice”). Construed broadly in favor of the insureds, the events
 25 constituting and completing an eviction are: (i) the owners’ service of the eviction notice, (ii) the
 26 tenants’ departure pursuant to the notice, and (iii) the owners’ repossession of the premises after the
 27 tenants’ departure. See Doc. No. 50 at 12:3-5; Swain, supra, 99 Cal.App.4th at p. 10.

Here, no part of the eviction took place in the policy period under any of these standards. Based only on the allegations of the *Venegas* complaints and the facts that were provided to GEICO upon Defendants' tender, Defendants served the Notice of Termination of Tenancy on March 13, 2018; then on April 21, 2018 the *Venegas* tenants vacated the premise pursuant to the Notice; and on May 1, 2018, Defendants recovered possession of the property after the tenants' departure. Between the allegations of the *Venegas* complaints and the other evidence available to GEICO which it obtained during its initial investigation, all three of the key events that amount to an eviction occurred prior to the policy's inception. Therefore, the *Venegas* Action never fell within the GEICO's policy's coverage for "wrongful eviction" because the eviction demonstrably occurred prior to the policy period.

Based only on the allegations of the *Venegas* complaints and the facts known to GEICO upon defendants' tender, the Court was correct in holding there is absolutely no potential for coverage and that GEICO did not have a duty to defend the Defendants in the underlying *Venegas* Action. The evidence developed during discovery only confirmed that there was never a duty to defend. Thus, there cannot be a duty to indemnify Defendants for the underlying *Venegas* Action where there was no potential of a covered claim alleged in the pleadings and thus no duty to defend existed.

Based on the foregoing, there is no genuine issue of material fact as to GEICO's Second Cause of Action (Duty to Indemnify), and GEICO is entitled to summary judgment as to that claim.

C. GEICO Has A Right To Reimbursement As It Funded The Defense Of The *Venegas* Action On Behalf Of Its Insured Under A Full And Complete Reservation Of Rights And The Claims In The *Venegas* Action Were Not Even Potentially Covered

1. An Insurer's Right To Reimbursement

For an insured's claim that is "at least potentially covered" under an insurance policy, the insurer has a duty to defend and therefore "may not seek reimbursement for defense costs." *Buss*, *supra*, 16 Cal. 4th at 49. This is true because the "insurer has been paid premiums by the insured" and has "bargained to bear these [defense] costs." *Id.* Therefore, the insurer does not have a right to reimbursement implied in law where a potential for coverage exists. *Id.* "Under the law of restitution, a right of this sort runs against the person who benefits from 'unjust enrichment' and in favor of the

1 person who suffers loss thereby.” Id.; quoting Rest., Restitution § 1, coms. a, c, & d, at pp. 12 & 13;
 2 accord, Rest.2d Restitution (Tent. Draft No. 1, Apr. 5, 1983) § 1, pp. 8-9.). Where potential for
 3 coverage exists, there is no reimbursement implied in law because the insurer suffers no loss when
 4 fulfilling their obligation under the policy to bear the “bargained-for defense costs,” therefore the
 5 insured cannot be “unjustly enriched” from the insurer paying such costs. Id. at 50.

6 On the other hand, where there are no potentially covered claims, the “insurer may indeed seek
 7 reimbursement for defense cost.” Id. This is true because the insurer has no duty to defend claims that
 8 are not potentially covered and the insurer has not received premiums for such coverage by the
 9 insured. Id. at 51.

10 An “insurer can reserve its right of reimbursement for defense costs by itself,” the “right is the
 11 insurer's alone, [and] it may be reserved by it unilaterally, without the insured's agreement.” Id. at 61;
 12 quoting Walbrook Ins. Co. Ltd. v. Goshgarian & Goshgarian, 726 F.Supp. 777, 783 (C.D.Cal.1989);
 13 see also Scottsdale Ins. Co. v. MV Transportation, 36 Cal. 4th 643, 656 (2005) (“the insurer may
 14 unilaterally condition its proffer of a defense upon its reservation of a right later to seek
 15 reimbursement of costs advanced to defend claims that are not, and never were, potentially covered by
 16 the relevant policy.”). However, “[t]o the extent that this right is implied in law as quasi-contractual, it
 17 must indeed be reserved.” Buss, supra, 16 Cal. 4th at 61; quoting Cf. 1 Witkin, Summary of Cal. Law
 18 (9th ed. 1987) Contracts, § 92, p. 123 (stating that, “[i]n an action in quasi-contract ..., a demand is
 19 ordinarily a necessary prerequisite.”). “As stated, under the law of restitution such a right runs against
 20 the person who benefits from ‘unjust enrichment’ and in favor of the person who suffers loss thereby.”
 21 Id. Where the insurer pays defense costs and there is no potential for coverage, the insured is unjustly
 22 enriched by the “insurer’s bearing of unbargained-for defense costs.” Id. “Not only is it good law that
 23 the insurer may seek reimbursement for defense costs as to the claims that are not even potentially
 24 covered, but it also makes good sense.” Id. at 52.

25 In Scottsdale, the insurer advanced defense costs for a third party suit between Plaintiff,
 26 Laidlaw Transit Services, Inc. (Laidlaw), and Defendant, MV Transportation (MV). Scottsdale, supra,
 27 36 Cal. 4th at 650. Laidlaw alleged, *inter alia*, that MV had misappropriated trade secrets by using
 28 Laidlaw’s confidential information. Id. Based on the holding in Buss, even though Scottsdale believed

1 its defense obligation was not triggered, it agreed to provide the defense under a reservation of its
 2 right to recover defense costs expended in defending “causes of action which raise no potential for
 3 coverage.” Scottsdale, *supra*, 36 Cal. 4th at 651. Thereafter, Laidlaw and MV reached a settlement
 4 which required MV to return documents containing allegedly misappropriated confidential
 5 information and cease from using such information in the future. *Id.* at 651. MV was not obligated to
 6 pay money to Laidlaw under the settlement agreement. However, attorney fees and defense costs
 7 were incurred. *Id.*

8 Following the settlement, in its pending declaratory relief action, Scottsdale “moved for
 9 summary judgment seeking a determination that it owed no legal defense obligations, and seeking
 10 reimbursement of the full amount paid for defense costs and fees.” *Id.* at 651-652. In the Supreme
 11 Court’s view, the Court of Appeal properly concluded that the policy issued did not provide MV
 12 coverage for their “improper use of Laidlaw’s trade secrets.” *Id.* at 653. However, the Supreme Court
 13 further explained that the Court of Appeal had incorrectly “ruled that Scottsdale could not recover fees
 14 and costs previously advanced toward MV’s defense” because Scottsdale’s “defense duty arose and
 15 continued until ‘extinguished’ by a judicial determination that no potential for coverage existed.” *Id.*
 16 The Court of Appeal’s view was that the “reimbursement claim was an unavailing attempt to
 17 terminate its defense duty ‘retroactively.’” *Id.* In reversing the Court of Appeal’s holding denying
 18 Scottsdale’s right to reimbursement, the Supreme Court identified the distinction between the
 19 underlying facts of Scottsdale and those that lead to the holding in Buss.

20 As explained in Buss, *supra*, 16 Cal.4th 35, 65, the duty to defend applies to potentially
 21 covered claims based on the facts alleged or disclosed. Scottsdale, *supra*, 36 Cal. 4th 643, 657. Where
 22 the duty to defend has arisen, the duty terminates once the action has concluded, but can be
 23 extinguished earlier where “no claim can in fact be covered.” *Id.* “If it is so extinguished, however, it
 24 is extinguished only prospectively and not retroactively: before, the insurer had a duty to defend; after,
 25 it does not have a duty to defend further.” *Id.* During the time the duty is in effect, “[t]he insurer must
 26 absorb all costs it expended on behalf of its insured... i.e., before the insurer established that the duty
 27 had ended.” *Id.* at 656–57; citing to Montrose Chemical Corp. v. Superior Court, 6 Cal.4th 287, 295
 28 (1993).

1 However, “where the third-party suit never presented any potential for policy coverage, the
 2 duty to defend does not arise in the first instance, and the insurer may properly deny a defense.”
 3 Scottsdale, *supra*, 36 Cal. 4th 643, 657. Furthermore, if a defense is not denied at the outset where it
 4 appears no potential coverage exists, as here, but instead the insurer decides to provide one subject to
 5 a “reservation of its right to reimbursement,” then “by law applied in hindsight” the “courts can
 6 determine that no potential for coverage, and thus no duty to defend, ever existed.” *Id.* at 658. Where
 7 it is determined that no potential for coverage ever existed, “the insurer, having reserved its right, may
 8 recover from its insured the costs it expended to provide a defense which, under its contract of
 9 insurance, it was never obliged to furnish.” *Id.*

10 In reaching this conclusion, the Supreme Court, citing Buss, noted ““not only is it good law
 11 that the insurer may seek reimbursement for defense costs as to the claims that are not even potentially
 12 covered, but it also makes good sense. Without a right of reimbursement, an insurer might be tempted
 13 to refuse to defend an action in any part — especially an action with many claims that are not even
 14 potentially covered and only a few that are — lest the insurer give, and the insured get, more than they
 15 agreed. With such a right, the insurer would not be so tempted, knowing that, if defense of the claims
 16 that are not even potentially covered should necessitate any additional cost, it would be able to seek
 17 reimbursement.”” *Id.* at 660. The Supreme Court then went on to explain that the same obligations
 18 were equally applicable in a case where an insurer never had a duty to defend to begin with but
 19 nevertheless did so because the law was unsettled: “An insurer facing unsettled law concerning its
 20 policy’s potential coverage of the third party’s claims should not be forced to either to deny defense
 21 outright, and risk a bad faith suit by the insured, or to provide a defense where owes none without any
 22 recourse against the insured for costs thus expended. The insurer should be free, in an abundance of
 23 caution, to afford the insured a defense under a reservation of rights, with the understanding that
 24 reimbursement is available if it is later established, as a matter of law, that no duty to defend ever
 25 arose.” *Id.* at 66.

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1 **2. An Insurer Is Entitled To Prejudgment Interest From The Time The**
 2 **Funds Were Expended**

3 Under California Civil Code § 3287(a), “a person who is entitled to recover damages certain,
 4 or capable of being made certain by calculation, and the right to recover which is vested upon the
 5 person upon a particular day, is entitled also to recover interest thereon from that day, except when the
 6 debtor is prevented by law, or by the act of the creditor, from paying the debt.” Under this section, it is
 7 well-established that “prejudgment interest is available to every person who is entitled to recover
 8 damages that are certain.” Evanston, *supra*, 566 F.3d 915, 921. “California cases uniformly have
 9 interpreted the ‘vesting’ requirement as being satisfied at the time that the amount of damages become
 10 certain or capable of being made certain, not the time liability to pay those amounts is determined. *Id.*,
 11 quoting Hartford Accident & Indem. Co. v. Sequoia Ins. Co., 211 Cal.App.3d 1285, 1291 (1989)
 12 (awarding prejudgment interest of 7% from the date plaintiff paid to settle a claim in full even though
 13 the defendants' legal liability obligating them to contribute to the settlement was not established until
 14 the entry of summary judgment). Thus, where an insurer is “entitled to reimbursement for the funds
 15 expended for the defense... of the lawsuits,” the insurer may also be entitled to “prejudgment interest
 16 from the time the funds were expended.” Hartford, *supra*, 211 Cal.App.3d at 1291.

17 **3. GEICO Has A Right To Reimbursement Because Defendants’ Wrongful**
 18 **Eviction Took Place Prior To The Inception Of The Policy Period, There**
 19 **Was No Potential For Coverage, And GEICO Reserved Its Right To**
 Reimbursement

20 There is no genuine issue of material fact regarding whether GEICO is entitled to
 21 reimbursement of defense costs. In the Court’s order granting GEICO’s Motion for Partial Summary
 22 Judgment, the Court held that “[t]he ‘occurrence’ of the eviction was demonstrably before the policy
 23 period” and “that as a matter of law, GEICO had no duty to defend here.” November 22, 2019 Order
 24 at 14: 17; 16: 2-3. This holding was based on the allegations of the *Venegas* complaints and the facts
 25 obtained by GEICO upon defendants’ tender, which established that on March 13, 2018, Defendants
 26 served the Notice of Termination of Tenancy; that on April 21, 2018 the *Venegas* tenants vacated the
 27 premise pursuant to the Notice; and that on May 1, 2018, Defendants admitted to having recovered
 28 possession of the property after the tenants’ departure. The three key events that completed the

1 eviction were present in the allegations of the *Venegas* complaints and the Statements of Occupancy
 2 filed with the San Francisco Rent Stabilization and Arbitration Board, demonstrating that the eviction
 3 indisputably occurred prior to the policy's inception and therefore there was no potential for coverage
 4 for the underlying *Venegas* Action. The additional evidence discovered in this case only corroborated
 5 what was alleged in the *Venegas* complaints and further confirmed that there was never any potential
 6 of coverage.

7 GEICO unilaterally reserved its right to reimbursement by way of its January 15, 2019
 8 reservation of rights letter addressed to Mr. and Ms. Nadkarni and the same reservation of rights was
 9 also reiterated in a letter dated February 4, 2019 to Defendants' attorney Mr. Campo, which stated in
 10 pertinent part that:

11 On January 15, 2019 GEICO acceded to the Nadkarnis' request and
 12 agreed to provide them with a defense in the *Venegas* Action via
 13 independent defense counsel pursuant to Civil Code § 2860, subject to
 14 a full reservation of rights under the terms of the GEICO PUP and the
 15 law, including the right to obtain reimbursement of defense costs
 16 incurred.

17 Wagoner Decl., October 17, 2019 Motion (Doc. No. 34-1) Ex. B at 1.

18 GEICO, under a full reservation of rights, expended funds for the defense of the Defendants,
 19 albeit having no duty to defend. To date, GEICO has expended a total of \$43,783.07 directly to the
 20 defense of Defendants' claims in the underlying *Venegas* Action. Trumpower Decl., October 17, 2019
 21 Motion (Doc. No. 34-2) Ex. D at 1. It is clear from the allegations of the *Venegas* complaints and the
 22 facts that were provided to GEICO upon Defendants' tender that GEICO had no duty to defend
 23 because all relevant dates of the wrongful eviction took place before the inception of the GEICO
 24 policy on May 8, 2018. Thus, GEICO "acting under a reservation of rights, defended an action in
 25 which, as it turns out, no claim was ever potentially covered." Scottsdale, *supra*, 36 Cal. 4th at 658-
 26 659. Nevertheless, GEICO was "free, in an abundance of caution to afford the insured a defense under
 27 a reservation of rights, with the understanding that reimbursement is available if it is later established,
 28 as a matter of law, that no duty to defend ever arose." *Id.* at 660.

1 In summary, GEICO agreed to fund the defense of the *Venegas* Action on behalf of its
 2 insureds under a full and complete reservation of rights, it was determined by the Court that no
 3 potential for coverage exists, and therefore, if the Court does not order Defendants to reimburse
 4 GEICO for such costs, Defendants will be unjustly enriched by the “insurer’s bearing of unbargained-
 5 for defense costs.” Buss, *supra*, 16 Cal. 4th at 51. For the forgoing reasons, no genuine issue of
 6 material fact exists regarding whether GEICO is entitled to reimbursement of the defense costs.
 7 GEICO is entitled to reimbursement of the defense costs expended under the California Supreme
 8 Court’s holding in Scottsdale, *supra*, 36 Cal. 4th 643.

9 In addition, being that GEICO is entitled to reimbursement of the costs expended for the
 10 Nadkarni’s defense in the underlying *Venegas* Action, so too is it entitled to “prejudgment interest
 11 from the time the funds were expended.” Evanston, *supra*, 566 F.3d at 922.

12 **IV. CONCLUSION**

13 There are no genuine issues of material fact to preclude entry of summary judgment in this
 14 matter. Based solely on the allegations in the *Venegas* complaints and Statements of Occupancy filed
 15 with the San Francisco Rent Stabilization and Arbitration Board, no potential for covered liability
 16 under the GEICO policy ever existed for the wrongful eviction claim because all relevant dates
 17 occurred prior to the inception of the GEICO policy period. On March 13, 2018 the Defendants served
 18 the notice of termination of tenancy. Pursuant to the notice, the *Venegas* tenants vacated the property
 19 on April 21, 2018. The Statement of Occupancy filed with the San Francisco Rent Stabilization and
 20 Arbitration Board on June 11, 2018 and November 8, 2018 by the Nadkarnis both indicated that they
 21 recovered possession of the premises on May 1, 2018. Because the allegations in the *Venegas*
 22 pleadings coupled with the Statements of Occupancy proved there was never any potential for covered
 23 liability falling within the scope of the coverage afforded by the GEICO Umbrella policy, there was
 24 never a duty to defend. Since GEICO never had a duty to defend, thus GEICO cannot have a duty to
 25 indemnify the Nadkarnis. Furthermore, GEICO agreed to fund the Defendants’ defense under a
 26 reservation of its right to reimbursement of defense costs expended in the *Venegas* Action, an action in
 27 which, as it turns out, never presented any potential for covered liability. Thus, no genuine issues of
 28 material fact exist regarding GEICO’s right to reimbursement and GEICO is therefore entitled to

1 reimbursement of the defense costs paid. In addition, GEICO is entitled to prejudgment interest
2 accruing from the time the funds were expended.

3 Thus, GEICO is entitled to judgment as a matter of law regarding its First Amended
4 Complaint's Second Cause of Action for Indemnity and Third Cause of Action for Reimbursement
5 pursuant to Federal Rules of Civil Procedure, Rule 56, and Civil Local Rules, Rule 56.1.

6 Dated: March 18, 2020

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By: _____

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